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NO. 305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

A. J. WHIPPLE & MILDRED WHIPPLE, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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COMMISSIONER OF INTERNAL REVENUE,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

A. J. Whipple and Mildred Whipple, Petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on April 4, 1962.

CITATIONS TO OPINIONS BELOW

The opinion of the Tax Court is printed in Appendix B hereto, infra p. 26, and is reported as a memorandum decision in 19 TCM 187, TC Memo 1960-36.

The opinion of the Court of Appeals for the Fifth Circuit printed in Appendix B hereto, infra p. 41 is reported in 62-1 U.S.T.C. 9385, 301 F. 2d 108.

JURISDICTION

The judgment of the Court of Appeals was entered on April 4, 1962, R. 196, Appendix B, infra p. 55. Rehearing was denied on May 11, 1962. R. 201. Appendix B, infra p. 56. The jurisdiction of this Court is invoked under 28 *U.S.C.*, Sec. 1254(1).

QUESTION PRESENTED

The sole question for decision in this case is whether the $56,975.10 debt of Mission Orange Bottling Company of Lubbock Inc. to Petitioner, A. J. Whipple, was a business bad debt or a non-business bad debt within the meaning of Section 23 (k) (1) or Section 23 (k) (4) respectively *Internal Revenue Code of 1939*. It was stipulated that it was a debt and that it became worthless in 1953.

STATUTES INVOLVED

The statutory provisions involved are Section 23(k)(1) and Section 23(k)(4) of the *Internal Revenue Code of 1939*, 26 *U.S.C.A.*, p. 46 (I.R.C. 1939). They are printed in Appendix A, infra p. 23 and 24. Section 39.23(k)-6 of the *Income Tax Regulations*, 26 C.F.R. 39.23(k)-6 is printed in Appendix A, infra p. 24.

STATEMENT

This case originated in the Tax Court on a petition by A. J. Whipple and Mildred Whipple for redetermination of a deficiency claimed by the Commissioner of Internal

Revenue pursuant to Section 1101 of the Internal Revenue Act of 1939 and Section 7442 of the *Internal Revenue Code of 1954*. (R. 6-13). The Tax Court held that petitioner was not entitled to deduct a $56,975.10 loss as a business bad debt. (R. 31-45). The Court of Appeals for the Fifth Circuit, by a divided court, affirmed the decision of the Tax Court. (R. 196). Appendix B, infra p. 41.

The debt in dispute arose by reason of loans made by petitioner to Mission Orange Bottling Co. of Lubbock, Inc. It was stipulated that it was a debt and that such debt became worthless in 1953. (R. 56).

The petitioner, A. J. Whipple, entered business in 1941 when he and W. E. Brown were partners in the construction of houses. (R. 116). Beginning in about 1942 petitioner participated in the formation of seven partnerships with Miles Strickland and others. (R. 117-121). During 1949 and 1950, petitioner was an original incorporator of seven corporations. (R. 61).

During the four years from 1949 through 1953, Petitioner was instrumental in incorporating 15 corporations and acquiring an interest in 5 additional corporations. (R. 134) At one time or another during this period, he was also a member of 10 partnerships. (R. 134-136)

During this period of time the Petitioner spent a large part of his time and energy in the construction and real estate business and the related building supply business. (R. 162)

In addition to his activities connected with the construction business he bought and operated a restaurant (R. 128), promoted oil ventures in Western Texas and elsewhere (R. 88), promoted a tile distributorship (R. 119-21), and helped form a private club (R. 140).

He bought land for Foley's Warehouse when they only had five days in which to do it before construction was to be commenced, for which he was paid a fee reported as ordinary income. (R. 147) He was frequently brought other deals, such as a cinder-block business in 1953, to help promote and raise money. He went into a lumber yard promotion deal with Alex W. Head after that. (R. 89)

Petitioner, A. J. Whipple, made numerous loans to the various corporations and partnerships, in which he had an interest, throughout the years in issue. For instance, his 1951 income tax return shows loans to five of these corporations and three partnerships. (R. 134)

Petitioner continued in this business of financing corporations and lending money, as is shown by the schedule attached to his 1952 income tax return showing ordinary interest income received from 14 corporations, partnerships and individuals (Exhibit 13-M), and the advances in 1953 of $25,000 to $30,000 to Angleton Building and Holding Co. (R. 161), and $52,500.00 of advances to Mission Orange Bottling Co. of Lubbock, Inc. His income tax returns for the years 1951-53 reflect interest income of $1,680.85, $2,285.35 and $1,747.59 respectively. (R. 37-38)

In 1944, Petitioner, A. J. Whipple bought some land on Airline Road and formed a corporation to construct a lumber yard on it which was rented to Airline Lumber and Supply, Inc., and several partnerships. (R. 122-4) (R. 118-9)

Petitioner continued in the rental business, forming Whipple Equipment Corporation in 1951, to rent automobiles, trucks construction and other equipment. (R. 136) In addition he bought, personally, the property and buildings at 2436 Bissonnet, which he leased to Whipple Lumber Company Inc. (R. 137-9) He also built a rent house

in Houston. (Exhibit 13-M) (R. 60) Petitioner individually bought some land in Lubbock and built a plant on it, (R. 154) which he leased to Mission Orange Bottling Company of Lubbock, Inc. at a monthly rental of $500.00. (R. 36) For the taxable year ending December 31, 1952 Petitioners reported ordinary income of $15,570.58 (Exhibit 13-M) (R. 60-61) and in 1953 $12,225.19 as net rentals. (Exhibit 20-T) (R. 62).

On April 25, 1951, Petitioner obtained a franchise from Mission Dry Company entitling him personally to produce, bottle and supply Mission beverages in certain counties in Texas (R. 57). During the same month he purchased the bottling machinery and equipment then owned by one D. C. Casey, who was operating the Mission Orange Company in Lubbock, Texas. (R. 57) He conducted this business as a sole proprietorship until approximately July 1, 1951, at which time he organized the debtor corporation, Mission Orange Bottling Company of Lubbock, Inc., and transferred the bottling machinery and equipment to it. (R. 58) In 1952 petitioner erected a new bottling plant and leased it to Mission Orange. (R. 58) During the years 1951 through 1953, he made advances to the bottling corporation in the amount of $131,778.26. (R. 102) On December 15, 1953 Petitioner advanced Mission Orange $48,000 to pay trade creditors. (R. 113) He received a transfer from Mission Orange of bottling machinery, equipment and an automobile, which had the value of $70,414.66. (R. 112) This left a net amount due by Mission Orange to him of $56,975.10, which it was stipulated became worthless in 1953. (R. 56)

In addition to the bottling corporation in Lubbock, Petitioner organized a soft drinks distributorship corporation

in Amarillo (R. 150) and a separate soft drinks vending machine business. (R. 153)

Petitioner introduced evidence in the Tax Court on four different types of business activities carried on by taxpayer, A. J. Whipple, for the purpose of producing ordinary income. (R. 60-62) This evidence also showed that the $56,975.10 bad debt in question had resulted from loans having been made by Petitioners in the ordinary course of carrying on these business activities.

Petitioners urged before the Tax Court and the United States Court of Appeals for the Fifth Circuit that the bad debt loss had resulted from Petitioner, A. J. Whipple's business activities in

1. Organizing, financing and managing corporations, partnerships and joint-ventures; or
2. Financing corporations and lending money; or
3. Acquiring, owning, expanding, equipping and leasing bottling plants and other equipment; or
4. Conducting activities in connection with the bottling and sale of soft drinks; or
5. A combination of the above activities.

The majority of the Court of Appeals for the Fifth Circuit held that Petitioner, A. J. Whipple's activities in connection with points 1, 2 and 4 above did not qualify him for business bad debt treatment and the majority of the Court made no finding as to points 3 and 5.

The decision of the majority of the Court below in refusing to allow petitioner to treat his loss as a business bad debt is in conflict with the decisions of *Mays v. Commissioners* (6th Cir.), 272 F. 2d 788, 60-1 *U.S.T.C.* 9122, *Maytag v. United States*, U. S. Court of Claims, 289 F. 2d 647, 61-1 *U.S.T.C.* 9424 and *Maloney v. Spencer* (9th

Cir.), 172 F. 2d 638, 49-1 *U.S.T.C.* 9176, *Commissioner v. Stokes' Estate* (3rd Cir.), 200 F. 2d 637, 53-1 *U.S.T.C.* 9164, and *Foss v. Commissioner* (1st Cir.), 76 F. 2d 326, 35-1 *U.S.T.C.* 9091.

REASONS FOR GRANTING THE WRIT

A. CONFLICT OF DECISIONS

1. The majority of the Court of Appeals for the Fifth Circuit held that in order for a taxpayer to deduct as a business bad debt one of many loans made in the course of organizing, financing and operating numerous corporations, he must also prove that he formed the corporations for the purpose of selling them. This holding is in conflict with decisions in three circuits and the Court of Claims.

The court evidently based this holding on the earlier Fifth Circuit Court of Appeals decision of *Giblin v. Commissioner*, 227 F. 2d 692, 56-1 U.S.T.C. 9103 from which it quoted as follows:

> "Taxpayer did not seek to show that he was engaged in the business of making loans. Neither did he seek to have the Tax Court 'pierce the corporate veil' and find he was engaged in the restaurant business or in any of the other businesses which he had promoted and dealt with during the preceding twenty years. What he did seek to prove was that he was regularly engaged in the business of seeking out business opportunities, promoting, organizing and financing them, contributing to them substantially 50% of his time and energy *and then disposing of them either at a profit or loss. . . .*" (Emphasis supplied)

In the dissent in the instant case, Judge Hutcheson said at R. 194, Appendix B, infra p. 53:

> "The taxpayer in the Cluett case was certainly not in the business of selling stock exchange seats, and Mr. Campbell was not in the business of selling coal companies. Yet the government contends, and the tax court and the majority have erroneously held, that in order for the loss to be deductible, taxpayer Whipple must show that the numerous corporate enterprises which he promoted, financed, and managed were formed by him for sale."

The Cluett and Campbell cases referred to by Judge Hutcheson were tax court cases,[1] but they have been followed by Courts of Appeal and by the Court of Claims in the following cases: *Mays v. Commissioner*, (6th Cir.), 272 F. 2d 788, 60-1 USTC 9122, *Commissioner v. Stokes' Estate*, (3rd Cir.) 200 F. 2d 637, 53-1 USTC 9164, *Maytag v. United States*, U.S. Court of Claims, 289 F. 2d 647, 61-1 USTC 9424.

In all of the above cases and in the case of *Foss v. Commissioner* (1st Cir.), 76 F. 2d 326, 35-1 USTC 9091 a business bad debt loss was allowed, but in none of them did the taxpayer show any evidence whatever of having formed corporations for sale, or in fact of having sold them.

2. Another conflict appears where the majority of the Court in the instant case went on to state at R. 187, Appendix B, infra p. 46:

> "We think that the tax court was amply warranted in finding that there was no evidence in this record other than the simple fact that the taxpayer had used his talents as a building contractor to organize a large number of companies to conduct such building

[1] **Robert Cluett 3rd v. Commissioner**, 8 TC 1178 (1947) Acq. 1947-2 CB.; **Vincent C. Campbell v. Commissioner**, 11 TC 510 (1948), Acq. 1949-1 CB.

> operations, that he was interested in any way in doing any more than enabling these separate corporations to achieve a successful and lucrative operation as corporations. Taxpayer's claim, it seems clear to us, falls within the class of those who fail to recognize the distinction between carrying on one's business through a corporate form, which of course, requires some organizing and financing, and the business of dealing in corporations, which may likewise require some financing arrangements."

In the dissent at R. 195, Appendix B, infra p. 54, Judge Hutcheson comments on this as follows:

> "It seems to me that the basic fault of the majority opinion is in holding, as it in effect does, that business bad debt treatment must be denied the taxpayer here because the loan was to a corporation in which he was interested. This holding is, in my opinion, a clear addition to the taxing statute. If congress had so intended, it could and would have so provided. Not having done so, neither the tax court nor this court can construe the statute as though it contained such provision."

This holding of the majority in the instant case is clearly in conflict with the majority of the Court in the case of *Maytag et al v. United States* (U.S. Court of Claims) 289 F. 2d 647, 61-1 USTC 9424, which allowed the taxpayer's business bad debt claim.[2] In that case the loss was suffered as the result of a bad debt of Maytag-Waynich, Inc., a corporation organized in 1951

[2]Decisions of Courts of Appeal in conflict with Court of Claims holdings are treated the same as conflicts with other Courts of Appeals. **Helvering v. Inter-Mountain Life Insurance Co.**, 294 U.S. 686, 689, 79 L.Ed. 1229.

to conduct one part of the taxpayer's general business of carrying on activities connected with the airplane industry. Prior to 1951 he had conducted such activities as a sole proprietorship.

The Court stated:

> "His reasons for incorporating the business were natural ones: the avoidance of personal liability in a hazardous business; the simplication of records; the possibility of getting additional capital from the outside * * *"

In reaching its decision the Court in the Maytag case stated:

> "If he had carried on all of these activities as an individual proprietor, as indeed he did carry on most of them for several years, he could without a question have included the successes and failures of all the separate branches of his business in the computation of his income. Our conclusion is that these activities were his business, and the bad debt which he seeks to deduct was a business bad debt * * * *It would be hard to imagine a loss more 'proximate' to that business activity than the uncollectibility of a loan made to it to promote its well being.*" (Emphasis supplied)

The Court went on to say:

> "What the government urges, as we see it, is that if one embodies his business in the corporate form, he may *in fact* spend his days in overalls working at a bench in his factory, but *in law* he will be regarded as engaging only in cashing dividend checks and clipping coupons. We see no reason to engage in such make believe."

The Court continued, very much as did the dissenting judge in the instant case, and stated:

> "If the lawmakers had intended to draw the line at the corporate form of business, they would have said so. If they had said anything susceptible of being interpreted to mean that, the Treasury in its regulations would have said so."

3. The holding of the majority of the Court of Appeals for the Fifth Circuit in the instant case is also in conflict with *Maloney v. Spencer* (9th Cir.) 172 F. 2d 638, 49-1 USTC 9176, a decision by the Ninth Circuit in which the facts were quite similar to those of Petitioner A. J. Whipple.

In their Petition for Review and Assignment of Error Petitioners A. J. and Mildred Whipple's fourth assignment of error was as follows:

> "4. The Tax Court of the United States erred in failing to make any finding as to petitioners' contention that petitioner, A. J. Whipple, was in the business of acquiring, owning, expanding, equipping and leasing bottling plants and other equipment, out of the conduct of which business the $56,975.10 bad debt loss resulted in the calendar year of 1953."

The parallel between the instant case and the *Spencer* case is apparent when the following is considered:

> (a) In the *Spencer* case the taxpayer organized three fruit, berry and vegetable packing and canning and dehydrating corporations, owned almost entirely by taxpayer, which operations were previously conducted by taxpayer individually.

1.(b) In the instant case Petitioner organized a soft drink bottling corporation and later a soft drink distributorship corporation, and a soft drink vending machine business. Petitioner was the controlling and dominant owner of all three of these and furnished the equipment for the bottling operation.

2.(a). In the *Spencer* case, to further equip one plant the taxpayer bought adjoining land, and erected building equipped for canning, and leased it to the cannery corporations.

2.(b). In the instant case Petitioner bought land in the same city and erected buildings on it, equipped for bottling soft drinks, which he leased to the bottling corporation.

3.(a). In the *Spencer* case the taxpayer agreed as part of the lease to provide adequate financing for the cannery business.

3.(b). When Petitioner built his building for the bottling plant he was already providing the bottling corporation with financing, having advanced $69,-002.50, and it was implicit in the lease that he would continue to do so, which he did, in the amount of an additional $62,775.75.

The Court in the *Spencer* case held that the taxpayer was engaged in the business of "acquiring, owning, expanding, equipping and leasing food processing plants". The facts are even stronger in the instant case for the finding that Petitioner was in the business of acquiring, owning, expanding, equipping and leasing a bottling plant and other businesses. Petitioner was in the rental business aside from these bottling enterprises. He had twice bought premises and equipped them for lumber yards, and was all throughout 1951-53 leasing land and buildings to

Whipple Lumber Co. He also had a rent house and had formed an equipment rental corporation to lease equipment to lumber yards and construction companies.

Therefore, within the rule of the *Spencer* case it would seem clear that Petitioner was in the business of acquiring, owning, expanding, equipping and financing a bottling plant and other businesses.

By refusing to make any holding on this assignment of error the Court of Appeals for the Fifth Circuit rejected the rule laid down in the case of *Maloney v. Spencer* (supra) and its decision is therefore in conflict with that decision of the Ninth Circuit.

B. IMPORTANCE

The importance of this case, not only to this taxpayer, but to the many other taxpayers similarly situated and the Courts, may first be emphasized by looking at the number of decisions which have dealt with the questions presented here. C.C.H. Tax Service reports that there were 192 cases involving the point which have been reported since Section 23 (k) (4) was enacted in 1942. In the past two years four Circuit Courts of Appeals and the Court of Claims have reported cases involving the question here under consideration. On varying fact situations, the Second Circuit in *Trent v. Commissioner*, 291 F. 2d 669, 61-2 U.S.T.C. 9506, the Fourth Circuit in *Rollins v. Commissioner*, 276 F. 2d 368, 60-1 U.S.T.C. 9357, the Fifth Circuit in this case below, the Sixth Circuit in *Mays v. Commissioner*, 272 F. 2d 788 60-1 U.S.T.C. 9122, and the Court of Claims in *Maytag v. United States*, 289 F. 2d 647, 61-1 U.S.T.C. 9424, each were forced to a contemplation of the varying and conflicting holdings of prior courts in

defining what constitutes a trade or business within Section 23 (k) (1) of the *Internal Revenue Code* of 1939 and its successor Section 166 (d) of the *Internal Revenue Code* of 1954.

In the words of one text writer: "The distinction between business and non-business debts has induced a confusing array of cases." (Rabkin & Johnson, *Federal Income, Gift & Estate Taxation*, § 35.01 (4)).

The courts have recognized the problem and their comments are informative. The Court of Appeals for the Sixth Circuit in the case of *Mays v. Commissioner*, 272 F. 2d 788, 60-1 U.S.T.C. 9122 said:

> "The issue of fact in each particular case is whether the loss is incidental to and proximately related to the taxpayer's trade or business. This determination is made difficult, for the reason that the code, the regulations and the decisions fail to define satisfactorily the term 'trade or business'."

Similarly, the Court said in *Trent v. Commissioner*, 2nd Cir., 291 F. 2d 669, 61-2 U.S.T.C. 9506:

> "Hence, if we were reading from a slate clean save for this statute, we would arrive swiftly at a holding (in favor of the taxpayer) * * * However, there is much other writing on the slate; we must determine whether it calls for reading the words of Section 166 (d) (2a) differently from what their sense would seem to be."

The dissent in the Court below in the same vein pointed out at R. 194, Appendix B, infra p. 53:

> "Yet the government contends, and the Tax Court and the majority have erroneously held, that in order

> for a loss to be deductible, taxpayer Whipple must show that the numerous corporate enterprises which he promoted, financed and managed, were formed by him for sale. This extension of the restriction on the qualification of business bad debts contended for by the Commissioner and the Tax Court considerably restricts the remedy which Congress provided for curing the mischief it had in mind. I think it clear that such restriction was never contemplated by Congress. Indeed the contention pressed here emasculates a clearly intended remedial law.
>
> "Looking at the question in the light of the language of the act and its legislative history, I am in no doubt that the Tax Court was wrong in citing and relying on cases to the contrary of these views for such a restrictive and defeating construction."

A decision by the Supreme Court in this case would clarify the definition of "trade or business" intended under the statute allowing the Tax Court, the District Courts, the Courts of Appeal, numerous taxpayers and the Commissioner to apply the definition to a particular situation with a degree of certainty now impossible because of the confused condition of the Law. Thus much litigation could be avoided which is not only expensive for both taxpayers and the government but which is consuming a vast amount of the time of the Federal Courts.

C. ERROR OF COURT BELOW

1. The majority of the Court of Appeals for the Fifth Circuit erred in the instant case in holding that the taxpayer in order to deduct as a business bad debt one of many loans made in the course of organizing, financing and operating numerous corporations, must also prove that he was a person who had formed the corporations for the purpose of selling them.

Petitioner submits that this is error as a matter of law, and cites as authority the following cases in which a business bad debt loss was allowed a taxpayer who showed no evidence whatever of having formed corporations for sale. *Foss v. Commissioner of Internal Revenue* (1st Cir.), 76 F. 2d 326, 35-1 USTC 9091; *Campbell v. Commissioner*, 11 T.C. 510 (1948); *Commissioner v. Stokes' Estate* (3rd Cir.), 200 F. 2d 637, 53-1 USTC 9164; *Henry E. Sage v. Commissioner*, 15 T.C. 299; *Charles H. Scott v. Commissioner*, 14 T.C.M. 1029; and the recent cases of *B. A. Mays v. Commissioner of Internal Revenue* (6th Cir.), 272 F. 2d 788, 12/14/59, 60-1 USTC 9122, reversing 17 T.C. 773, and *L. B. Maytag, Jr. v. United States*, U. S. Court of Claims 5/3/61, 289 F. 2d 647, 61-1 USTC 9424.

2. The majority of the Court erred in holding that the $56,975.10 bad debt incurred by Petitioner, A. J. Whipple, which had resulted from his broad activities as the holder of a bottling franchise, the builder and lessor of the buildings in which the bottling plant was carried on, the owner of the bottling equipment, the manager as well as President and controlling stockholder of the bottling corporation, the controlling owner and operator of two other related soft drink businesses was not a business bad debt because the loans which were the basis of the $56,975.10 bad debt were made to a corporation in which Petitioner was interested. Numerous decisions have held against such a limitation on the business bad debt treatment of a loan.[3]

[3]The following leading cases allowing taxpayer business bad debt treatment involved loans to corporations in which taxpayer was a substantial stockholder. **Campbell v. Commissioner**, 11 T.C. 510; **Commissioner v. Stokes' Estate** (3 Cir.), 200 F.2d 637; **Maloney v. Spencer** (9 Cir.), 172 F.2d 638; **Foss v. Commissioner** (1 Cir.), 75 F.2d 682; **B. A. Mays v. Commissioner** (6 Cir.), 272 F.2d 788, 60-1 USTC, 9122, reversing 17 T.C. 773; **L. B. Maytag, Jr. v. U. S.** (U. S. Court of Claims), 289 F.2d 647; 61-1 U. S. Tax Cases 9424.

3. The majority of the Court of Appeals for the Fifth Circuit erred in failing to make any ruling on the fourth point urged by Petitioners in their Petition for Review and Assignments of Error which read as follows:

> "The Tax Court of the United States erred in failing to make any finding as to petitioners' contention that Petitioner, A. J. Whipple was in the business of acquiring, owning, expanding, equipping and leasing bottling plants and other equipment out of the conduct of which business the $56,975.10 bad debt loss resulted in the calendar year 1953."

As pointed out in detail in showing the conflicts between the decision of the Court of Appeals for the Fifth Circuit in the case below and cases in other circuits, the facts of the instant case brought it within the rule of *Maloney v. Spencer* (9th Cir.), 172 F. 2d 638, 49-1 USTC 9176, a case in which a business bad debt was allowed the owner, expander, equipper and lessor of canning plants. Under the doctrine of that case, Petitioner, A. J. Whipple, should have been allowed the same treatment, and it was error not to treat his $56,975.10 loss as a business bad debt.

4. The majority of the Court of Appeals for the Fifth Circuit erred in holding that the $56,975.10 bad debt incurred in Petitioner A. J. Whipple's extensive activities[4] of financing and making loans to corporations, partnerships

[4]Petitioners' income tax returns show that Petitioner, A. J. Whipple, received interest from a total of 34 parties during the years 1951 through 1953 and reported as ordinary income the receipt of $1,680.15 in 1951, $2,307.35 in 1952, and $1,747.59 in 1953 (Exhibits 12-L, 13-4, 20-T). Total loans in the amount of $131,788.26 were made to Mission Orange Bottling Company of Lubbock through July 1, 1951 to December 15, 1953 (R. 102) and a $25,000 to $30,000 advance was made to Angleton Building & Homes Corp. in 1953 (R. 161).

and individuals could not be a business bad debt because Petitioner was not in the *separate* business of lending money. No authority is cited for such a ruling. The case of *Charles H. Scott v. Commissioner*, 14 T.C.M. 1029, is clear authority for just the opposite.

In that case twelve enterprises were mentioned in the stipulation which the taxpayer, Scott, had been instrumental in organizing. He had loaned money to six. To six he had not. He was sole owner, an officer, or a director of all of them and took an active part in their activities.

The Court held:

> "The loans were business as opposed to non-business bad debts. Henry E. Sage, 15 T.C. 299; Vincent C. Campbell, 11 T.C. 510; Maloney v. Spencer, 172 F. 2d 638."

In none of these cases was the taxpayer in the separate business of lending money.

5. The majority of the Court of Appeals perpetuated the error of the Tax Court by failing to make any finding as to whether a *combination* of Petitioner's activities constituted a business to which the $56,975.10 bad debt loss sustained in 1953 was proximately related, although this was specifically stated as Petitioners' Fifth Assignment of Error.

Instead the Court segregated Petitioners' activities into three lines of endeavor, narrowly considered each of them separately, and then one by one concluded that Petitioner was not in that *particular* business.

The Court completely ignored Petitioner's contention that the $56,975.10 bad debt loss proximately resulted from a combination of A. J. Whipple's activities as organizer, owner, financer, lessor, officer, manager and soft

drink franchise holder, which combination generated $95,950.14 of ordinary income in the years 1951-52.[5]

It is respectfully submitted that a debt arising from such activities was clearly a business bad debt within the meaning of Section 23 (k) (1) IRC 1939. *Maytag, et al. v. United States,* 289 F. 2d 647, U.S.C.C. 61-1 USTC 9424; *Mays v. Commissioner,* 272 F. 2d 788, (6 Cir.) 60-1 USTC 9122; *Sage v. Commissioner,* 15 T.C. 299.

Perhaps the Court in the *Sage* case, (supra) best described the type of activities which, though hard to classify, in combination constitute a business. At page 303 the Court said:

> *"Some of his activities may appear trivial and it may be inappropriate to fit some of the uses to which he put his time or money or both into the pattern of any business regularly carried on by him.* But even if some

[5]It was stipulated in the Tax Court as follows (R. 60-61): "23. On March 18, 1953, petitioners filed a joint individual income tax return, Form 1040, for the taxable year 1952. Photostat thereof is hereto attached, marked Exhibit 13-M, and made a part hereof, showing income from the following sources:

Form No.	Company	Exhibit No.
W-2	Whipple Lumber Company	13-M1
W-2	Whipple Construction Company	13-M2
W-2	Whipple Equipment Co., Inc.	13-M3
W-2	Angelton Homes Corp.	13-M4
W-2	Dozier-Whipple Const. Corp.	13-M5
1099	Federated Department Stores, Inc.	13-M6
1099	Durham-Clark Building Supply Co.	13-M7
1099	Whipple Lumber Company	13-M8

Interest received from 14 corporations, partnerships, and corporations:
Restaurant
Partnership
Lee County Oil Lease
Rent House Houston
Rental Building in Lubbock."

are disregarded, enough are left to show that he was regularly carrying on a business. *There may be difficulty or difference of opinion in defining that business properly, but it existed and was apparent.* * * *" (Emphasis supplied).

6. The majority of the Court of Appeals for the Fifth Circuit erred in relying on the confused interpretation put on the statute by decisions which have construed the statute so narrowly as practically to defeat its remedial purpose, rather than relying on the language of the legislative history and treasury regulations[6] pertaining to the statute.

As pointed out by Judge Hutcheson in his dissent in the decision below at R. 191, Appendix B, infra p. 50:

> "The language of the act and its legislative history both show that congress, desiring to encourage risk taking with respect to loans incurred in connection with business and to discourage the making of loans for use taxwise to kinsmen or friends, gave favorable tax treatment to bad debts arising out of, or in connection with business ventures, while denying such treatment to purely personal bad debts or those where other than business considerations motivated the lend-

[6]Section 39.23 (k)-6, Income Tax Regulations, Internal Revenue Code, 1939:

> "(b) The character of the debt for this purpose is not controlled by the circumstances attending its creation or its subsequent acquisition by the taxpayer or by the use to which the borrowed funds are put by the recipient, but is to be determined rather by the relation which the loss resulting from the debt's becoming worthless bears to the trade or business of the taxpayer. If that relation is a proximate one in the conduct of the trade or business in which the taxpayer is engaged at the time the debt becomes worthless, the debt is not a nonbusiness debt for the purposes of this section."

> ing. I think that the purpose of the statute was, and is, not advanced and the remedy is completely defeated when the mischief the statute was designated to meet is dropped entirely out of the consideration, as in the board's decision here, in some of the decisions the board relies on, and in the majority opinion."

7. The majority of the Court of Appeals below erred in basing its decision, in part, on conclusions in direct opposition to the stipulations of fact in the Tax Court.

The majority of the Court cast doubt as to whether $48,000 of the $56,975.10 loss was actually a bad debt by saying at R. 184, Appendix B, infra p. 43:

> "Thus it appears that at the time when the sum of $48,000 of the indebtedness in issue was advanced to Mission Orange petitioner had no hope of its being recovered."

The conclusion drawn by the majority of the Court below goes behind and is directly contrary to Stipulation No. 7 in the Tax Court which was as follows (R. 56):

> "That as of December 31, 1953, Mission Orange Bottling Co. of Lubbock, Inc., was indebted to Petitioner, A. J. Whipple, in the amount of $56,975.10, and that such debt had become worthless in 1953, and the sole issue remaining as to said sum of $56,975.10 is whether said sum is a business bad debt or a non-business bad debt within the meaning of Section 23 (k) (1) or Section 23 (k) (4), respectively, Internal Revenue Code of 1939."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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It is hereby certified that a copy of the above and foregoing Petition For A Writ Of Certiorari to the United States Court of Appeals For The Fifth Circuit was served on each of the following by depositing the same in a United States post office, air mail postage prepaid, this _____ day of August, 1962:

(1) Solicitor General
Department of Justice
Washington 25, D. C.

(2) Louis F. Oberdorfer
Assistant Attorney General
Tax Division
Department of Justice
Washington N. W., D. C.

Of Counsel for petitioner

APPENDIX A

Section 23(k)(1) of Internal Revenue Code, 1939

(k) Bad Debts

(1) General Rule—Debts which become worthless within the taxable year; or (in the discretion of the Commissioner) a reasonable addition to a reserve for bad debts; and when satisfied that debt is recoverable only in part, the Commissioner may allow such debt, in an amount not in excess of the part charged off within the taxable year, as a deduction. This paragraph shall not apply in the case of a taxpayer, other than a bank, as defined in section 104, with respect to a debt evidenced by a security as defined in paragraph (3) of this subsection. This paragraph shall not apply in the case of a taxpayer, other than a corporation, with respect to a non-business debt, as defined in paragraph (4) of this subsection. In the case of a mutual savings bank not having capital stock represented by share, a domestic building and loan association, and a cooperative bank without capital stock organized and operated for mutual purposes and without profit, the reasonable addition to a reserve for bad debts shall be determined with due regard to the amount of the taxpayer's surplus or bad debt reserves existing at the close of December 31, 1951. In the case of a taxpayer described in the preceding sentence, the reasonable addition to a reserve for bad debts for any taxable year shall in no case be less than the amount determined by the taxpayer as the reasonable addition for such year; except that the amount determined by the taxpayer under this sentence shall not be greater than the lesser of (A) the amount of its net income for the taxable year, computed without regard to this subsection, or (B) the amount by which 12 per centum of the total deposits or withdrawable accounts of its depositors at the close of such year exceeds the sum of its surplus, undivided profits, and reserves at the beginning of the taxable year.

Section 23(k)(4) of Internal Revenue Code, 1939

(4) Non-Business Debts -- In the case of a taxpayer, other than a corporation, if a non-business debt becomes worthless within the taxable year, the loss resulting therefrom shall be considered a loss from the sale or exchange, during the taxable year, of a capital asset held for not more than 6 months. The term "non-business debt" means a debt other than a debt evidenced by a security as defined in paragraph (3) and other than a debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business.

Section 39.23(k)-6, Income Tax Regulations, Internal Revenue Code, 1939

Nonbusiness bad debts

(a) In the case of a taxpayer, other than a corporation, if a nonbusiness bad debt becomes entirely worthless within the taxable year, the loss resulting therefrom shall be treated as a loss from the sale or exchange of a capital asset held for not more than six months. Such a loss is subject to the limitations provided in section 117 with respect to gains and losses from the sale and exchange of capital assets. A loss with respect to such debt will be treated as sustained only if and when the debt has become totally worthless, and no deduction shall be allowed for a nonbusiness debt which is recoverable in part during the taxable year. Nor are the provisions of this section applicable in the case of a loss resulting from a security as defined in section 23 (k) (3). A non-business debt is a debt, other than a debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business and other than a debt evidenced by a security as that term is defined in section 23(k)(3). The question whether a debt is one the loss from the worthlessness of which is incurred in the taxpayer's trade or business is a question of fact in each particular case. The determination of this

question is substantially the same as that which is made for the purpose of ascertaining whether a loss from the type of transaction covered by section 23(e) is "incurred in trade or business" under section 23(e)(1).

(b) The character of the debt for this purpose is not controlled by the circumstances attending its creation or its subsequent acquisition by the taxpayer or by the use to which the borrowed funds are put by the recipient, but is to be determined rather by the relation which the loss resulting from the debt's becoming worthless bears to the trade or business of the taxpayer. If that relation is a proximate one in the conduct of the trade or business in which the taxpayer is engaged at the time the debt becomes worthless, the debt is not a nonbusiness debt for the purposes of this section.

APPENDIX B

MEMORANDUM FINDINGS OF FACT AND OPINION.

Filed February 29, 1960.

T. C. Memo. 1960-36.

Tax Court of the United States

A. J. Whipple and Mildred Whipple, Petitioners,

v. Docket No. 65603.

Commissioner of Internal Revenue, Respondent.

Ben H. Schleider, Jr., Esq., and Charles Dillingham, Esq., for the petitioners.
D. Louis Bergeron, Esq., for the respondent.

Opper, Judge: Respondent determined deficiencies in petitioners' income tax and in additions to tax for the years 1952 and 1953 as follows:

Year	Income Tax	Sec. 294[1] (d) (1) (A)	Sec. 294 (d) (1) (B)	Sec. 294 (d) (2)
1952	$ 297.04	$2,664.07	—0—	$1,776.04
1953	17,625.78	1,326.54	$804.00	248.29

The issues to be decided are (1) whether a $56,975.10 debt owed to petitioners in 1953 which became uncol-

[1]All section references are to the Internal Revenue Code of 1939.

lectible in that year was a business or nonbusiness bad debt within the meaning of section 23 (k), and (2) whether $3,349.50, paid by petitioners in 1953 to D. M. Dozier, is a deductible business expense or a capital expenditure. Petitioners abandoned, on brief, all alleged errors in regard to the imposition of additions to tax under section 294(d), except as to the correct amount of additions to tax due for 1953 under section 294 (d) (1) (A) which may be resolved in accordance with Rule 50 after we dispose of the major issues presented for our decision. Other issues raised by the pleadings have either been conceded or resolved by stipulation.

Findings of Fact.

The stipulated facts are found.

A. J. Whipple, hereafter called petitioner, and Mildred Whipple are husband and wife and reside in Houston, Texas. They filed their joint income tax returns for 1952 and 1953 with the district director of internal revenue at Austin, Texas.

Petitioner, prior to 1941, was a construction superintendent and an estimator for a lumber company. In 1941, and for about a year thereafter, he and W. E. Brown were partners in the construction of houses and homes.

Around 1942 petitioner, Miles Strickland and W. C. Perkins formed the S.W.P. Construction Company, a partnership organized to build houses. Perkins later withdrew from this venture and the partnership became known as S. & W. Construction Company. At some time

subsequent to 1942, petitioner and Strickland formed the following partnerships: Evergreen-Rice Company, a construction company; Airline Lumber and Supply Company, Ltd., of which John W. Anderson was also a partner; Shakertown Distributors, formed, with Anderson, to distribute shingles; Gulf Coast Plumbing and Supply Company; and State Tile Distributors, a wholesale tile company which resulted from petitioner's informal negotiations to purchase 4 carloads of tile.

During the years 1949 and 1950, petitioner was an original incorporator of 7 corporations, as follows: Federal Road Building Corporation; Richmond Plaza, Inc.; Strickland-Whipple Construction Company, Inc., a successor to the partnership S. & W. Construction Company; Airline Lumber and Supply Company, Inc., a successor to the partnership, Airline Lumber and Supply Company, Ltd.; Dorwayne Construction Corporation; 29th and Airline, Inc., a real estate rental corporation which owned and rented the property occupied by Airline Lumber and Supply Company, Inc., and Shakertown Distributors; and Federal Road Lumber Company, Inc.

In 1951 petitioner sold his interest in the 7 above-named corporations and in Shakertown Distributors to Miles Strickland. During the same year he sold to Strickland his equity in 5 other corporations. In his 1951 income tax return, petitioner reported this sale as relating to property he acquired in 1949. These 5 corporations, namely, Industrial Homes, Inc., Harbor Homes, Inc., Commonwealth and California Corporation, Commonwealth and Missouri Corporation, and Riverside Apart-

ments Corporation, were in the rental housing or construction business. All of these sales resulted in gain to petitioner which he reported on his 1951 return as long-term capital gain.

In 1951 petitioner purchased the land and improvements located at 2436 Bissonnet Street, Houston, Texas, as the location for various construction businesses and other enterprises. He formed the A. J. Whipple Construction Company, which was a partnership of petitioner, V. L. Yarborough, Leonard Olive and G. A. Durham. This partnership was later succeeded by another partnership, A. J. Whipple Construction Co. No. 2.

During the years 1951 and 1952, petitioner was an original incorporator of 8 corporations, as follows: Whipple Lumber Company; Whipple Equipment Co., Inc., which engaged in the business of renting automobiles, trucks and construction equipment; Dozier-Whipple Construction Corporation; Chevy Chase Development Corporation; Whipple Construction Co., Inc.; Angelton Homes Corporation; Angelton Building & Holding Corp.; and Mission Orange Bottling Co. of Lubbock, Inc., hereafter called Mission Orange. During 1952 and 1953, petitioner received salaries totaling $29,400 and $33,450, respectively, from some of the construction corporations.

Petitioner acquired land in Pasadena, Angelton, Bellaire and Houston, Texas, and engaged in sales activities with respect to such lands during 1951 through 1953. He purchased a restaurant in Houston and sold it to Guy Francis on June 1, 1953. At some time he engaged in several oil ventures.

On April 17, 1951, petitioner acquired an option to purchase the Mission Orange Bottling Co., a sole proprietorship owned by D. C. Casey. On April 21, 1951, petitioner, as lessee, rented the premises occupied by Casey's business for 20 months, effective May 1, 1951, for $150 per month. On April 25, 1951, petitioner obtained a franchise from the Mission Dry Corporation entitling him to produce, bottle, distribute, and sell Mission beverages in certain counties in Texas. On April 27, 1951, petitioner purchased the bottling machinery and equipment from Casey for $46,225. He conducted this business as a sole proprietorship under the name Mission Orange Bottling Co. until approximately July 1, 1951, when he sold the bottling machinery and equipment to Mission Orange. He did not transfer the franchise to Mission Orange.

Mission Orange was organized under the laws of Texas on June 8, 1951, with an authorized capital stock of $20,000, of which amount $10,000 or 100 shares, par value of $100 each, were subscribed to and paid for by the following persons:

Shareholder	Office Held	Shares	Par Value
Petitioner	President	88	$ 8,800
James A. Finley	Vice President	10	1,000
Charles Dillingham	Secretary	2	200
Total		100	$10,000

The charter of Mission Orange was amended on December 8, 1952 to increase the authorized capital stock to $40,000. Thereafter the issued and outstanding stock was held as follows:

Shareholder	Shares	Per cent	Par Value
Petitioner	308	77.	$30,800
James A. Finley	10	2.5	1,000
Charles Dillingham	2	.5	200
Cecil Clark	20	5.	2,000
Dora B. Ellzey	10	2.5	1,000
D. M. Dozier	10	2.5	1,000
Jack Knostman	20	5.	2,000
James F. Webster	20	5.	2,000
Total	400	100.	$40,000

Sometime prior to the end of 1953, petitioner increased his holding to 318 shares, which was 79.5 per cent of those outstanding and represented an investment of $31,800.

In 1952 petitioner erected a bottling plant on land which he purchased in Lubbock, Texas. The land and building cost a total of $43,601.70. On July 14, 1952, petitioner leased this plant to Mission Orange for a 10-year term, beginning August 1, 1952, with an option to renew. The prescribed rental was $500 per month for the first 3 years and $500 per month plus 1 per cent of gross sales thereafter. In his 1952 and 1953 return, petitioner claimed a deduction for depreciation of the bottling plant in Lubbock. These returns reflect that petitioner received no rent during either year for that building.

Petitioner, directly or indirectly, made cash advances to Mission Orange of $48,550 in 1952 and $6,750 in 1953. He paid Mission Orange's expenses amounting to $2,975.76 during the years 1951 through 1953 and re-

ceived refunds and credits totaling $4,388.50. The balance due to petitioner by Mission Orange on December 1, 1953, including the amount of $25,502.50 owed him as the result of his sale of the bottling assets to the corporation in July 1951, was $79,489.76.

On December 15, 1953, petitioner advanced Mission Orange $48,000 to pay general creditors and on the same date received a transfer from Mission Orange of bottling machinery, equipment and an automobile which had a total book value of $70,414.66. The net amount due by Mission Orange to petitioner on December 31, 1953 was $56,975.10. This debt became worthless in 1953.

On September 1, 1951, petitioner acquired stock of a corporation known as Mason Root Beer. This corporation owned a franchise to bottle and sell Mason root beer in Amarillo, Texas. The root beer was bottled at the Mission Orange plant in Lubbock. Mason Root Beer failed in 1953 and petitioner's return for that year reflects a $3,300 loss on his stock in that corporation and a nonbusiness bad debt due from that corporation of $53.33.

Petitioner had a vending machine arrangement with Ideal, Indiana, which sold vending machines to the trade. Mission Orange had no interest in this venture.

Petitioner made loans to his various corporations, partnerships, fellow shareholders and partners throughout the years in issue. His income tax returns for 1951, 1952 and 1953 reflect interest income as follows:

Payor	1951	1952	1953
Whipple Lumber Co., Inc.	$ 19.35	$ 868.51	$1,047.38
Dozier-Whipple Construction Corp.	61.42	393.89	—
Whipple Construction Co., Inc.	130.68	5.61	—
Angleton Homes Corp.	391.98	—	—
A. J. Whipple Construction Co.	4.92	44.28	—
Cecil Clark	70.56	45.61	—
D. M. Dozier	70.56	45.61	—
G. A. Durham	86.98	74.33	—
J. A. Finley	64.46	—	—
Whipple Equipment Co., Inc.	591.89	575.51	37.82
Willard Evans	70.56	45.61	—
Dora Ellzey	70.56	45.61	—
L. R. Olive	24.99	4.76	—
Durham-Clark Building Supply Co.	9.24	57.95	—
W. N. Atkins	20.81	*(20.81)	—
Roy J. Pate	1.19	*(1.19)	—
Harland Miller	—	47.00	—
The Brag Club, Inc.	—	53.07	19.16
Guy Francis—Guy's Restaurant	—	—	643.23
Total Interest Income	**$ 1,680.15	$ 2,285.35	$ 1,747.59

* Interest accrued and unpaid in 1951.

**The correct total is $1,690.15.

Petitioner deducted the debt due from Mission Orange on his 1953 return as a business bad debt. Petitioner was not in the business of organizing, promoting, managing or financing corporations in 1953. He was not in the business of lending money in that year.

In his return for 1953, petitioner deducted $3,349.50 as "commissions" paid to D. M. Dozier. Respondent determined that this payment "constitutes part of the cost of acquiring land * * * in 1952 and sold during 1953 * * *." $3,349.50 was entered on petitioner's records as a part of the costs of the purchase of the Westheimer tract, which petitioner purchased on April 3, 1952 for $583,181.47 and sold in 1953 for $672,282.00. At some later time, $3,349.50 was credited on petitioner's records to the Westheimer tract and charged as a direct expense. Petitioner hired Dozier in 1951, agreeing to pay him a salary, expenses and 15 per cent of profits of all joint ventures, partnerships and individual land deals in which petitioner had an interest, except Whipple Lumber Company. Dozier left petitioner's employ in February 1953 before the sale of the Westheimer tract and was paid approximately $29,000 for his share of profits, both realized and anticipated. The $3,349.50 in dispute was included in the foregoing payment. That amount is 15 per cent of the profits anticipated to be realized from the sale of the Westheimer tract.

Petitioner failed to file a declaration of estimated tax for 1952. It is stipulated that he filed such a declaration for 1953 on January 14, 1954.

OPINION

The primary issue here is one that is frequently before this Court. Petitioner, through guarantees or outright

loans, advanced substantial sums to a corporation which he controlled. Later developments proved his investment unfortunate and he is here claiming that his uncollectible advances arose out of his trade or business and that he should be permitted to deduct them in full and without regard to the limitations imposed on nonbusiness bad debts by section 23 (k) (4).

Petitioner would have us find a proximate relationship between the loss occasioned by the worthlessness of the debt due from Mission Orange and any one of three businesses in which he alleges he was individually engaged at the time of the loss. He contends that he was in the business of organizing, promoting, managing and financing corporations, general financing and lending of money, operating a bottling business, or all three.

Looking first to petitioner's alleged promotional activities, it is apparent that he was instrumental in incorporating 15 corporations over a period of less than 4 years, commencing in 1949. Fourteen of these corporations were engaged in the construction, building or real estate business. Petitioner owned stock in 5 additional construction or real estate corporations and at one time or another was a member of 10 partnerships involved in similar activities. Individually, petitioner was in the construction or real estate business.

What petitioner fails to recognize is the distinction between carrying on one's business through a corporate form, which, of course, requires some organizing and financing, and the business of dealing in corporations, which may likewise require some financing arrangements. [Holtz v. Commissioner, (C.A. 9) 256 F. 2d 865, 870, affirming T.C. Memo. 1957-106.]

His purpose in forming the 14 corporations was to facilitate his construction or real estate business and not to de-

velop them for sale as going businesses to customers in the course of the business of promoting. H. Beale Rollins, 32 T.C. 604, 615. Petitioner apparently entertained that opinion himself in the year 1951 when in his return for that year he reported the sale of 12 corporations and 1 partnership as the sale of capital assets. See Thomas Reed Vreeland, 31 T.C. 78. The evidence does not show that petitioner's business in 1953 was any different from 1951.

Petitioner invites our attention to his 1951, 1952 and 1953 returns to substantiate his claim that he was in the business of lending money. In 1951 he reported the receipt of $1,680.15 as interest from 16 corporations, partnerships or individuals; $1,200.24 of this sum was interest received from his construction corporations or partnerships. In 1952 he reported the receipt of $2,307.35 as interest from 14 corporations, partnerships or individuals; $1,887.80 of this sum was interest received from his construction corporations or partnerships. In 1953, $1,747.59 was reported as interest received from 4 corporations or individuals and $1,085.20 of this amount was received from 2 of his construction corporations. Some of the other amounts were trivial, such as $9.24 and $1.19 received from Durham-Clark Building Supply Company and Roy J. Pate, respectively, in 1951, and $4.76 received from L. R. Olive in 1952. It therefore appears that the bulk of petitioner's loans went to corporations and partnerships in which he had an investment and we cannot find that the purpose of these loans was other than to protect that investment. Such lending activity does not constitute a trade or business. Holtz v. Commissioner, supra.

The remaining loans reflected by petitioner's interest receipts were, to a large extent, made to fellow shareholders and partners. We cannot find that lending activity of this

nature constitutes trade or business. However, even if we were to find otherwise, there is no evidence that the advances made to Mission Orange were made as a part of that business. Petitioner received intermittent payments from Mission Orange, admittedly small in amount, but he reflected no amount as having been received as interest and there is no evidence that that corporation agreed or was obligated to pay interest. Without interest petitioner stood to make no profit on the loan, and if there is no prospect of profit there is no trade or business. Thacher v. Lowe, (S.D.N.Y.) 288 F. 994.

Petitioner's contention that he was in the bottling business when the debt in question became worthless is without evidentiary support for two reasons. First, petitioner would have us find that he was in the bottling business from December 15 through December 31, 1953 because he was "the dominant stockholder of Masons Root Beer, a participant in soft drink vending machine business, the President of Mission Orange Bottling Co., Inc., the holder of 79% of its stock, the owner of the building in which the bottling plant was located, the holder of the bottling franchise, the owner of the bottling machinery and equipment, [and] the plant manager." Petitioner's relation to Mason Root Beer and Mission Orange as a shareholder, officer or employee does not place him in the business in which the corporations were engaged. Burnet v. Clark, 287 U.S. 410. Although it appears that petitioner had sufficient assets subsequent to December 15, 1953 to engage individually in the bottling business, there is no evidence that he did so; and the mere ownership of these assets does not put him in the bottling business.

The second fault we find with petitioner's contention is that the stipulated date of worthlessness of the debt is

the year 1953 and there is nothing in the record which might support petitioner's allegation of a more specific date, that is December 31, 1953. If we were required to find a definite time of worthlessness, we should be inclined to select December 15, 1953, at which time petitioner received the bottling assets from Mission Orange in partial satisfaction of that corporation's obligation. At this point petitioner was not in the bottling business. It may be, moreover, that any debt arising at that time was worthless when acquired.

Even if we assume that the debt became worthless subsequent to December 15 and at a time when petitioner was in the bottling business, petitioner must still show us the proximate relationship between his business and the bad debt loss. Jan G. J. Boissevain, 17 T.C. 325. We have been unable to ascertain any proximate relationship between the debt owed by Mission Orange, a corporation no longer in the bottling business, and petitioner's alleged business of bottling soft drinks, and petitioner has pointed out none. A more realistic description of that payment might be an exchange or purchase of corporate assets.

The bad debt losses in question were not incurred in any trade or business conducted by petitioner. They are nonbusiness bad debts and accordingly are to be treated as short-term capital losses. Section 23 (k) (4).

The evidence submitted in regard to the second issue is vague and indefinite. Petitioner contends that he paid D. M. Dozier $3,349.50 under a contract of employment. The amount in controversy is claimed to have been but a part of a larger sum paid by check to Dozier. Although the testimony is slight, there is no contrary evidence, and on the strength of petitioner's statements under oath, we accept his version that the payments were ordinary and

necessary as compensation for contributing services and not a part of a commission on the purchase of specific property.

The final issue concerns additions to tax relating to declarations of estimated tax. The briefs in this case were filed before the Supreme Court handed down its decision in Commissioner v. Acker, 361 U.S. 87. It was held in that case that the additions to tax under section 294 (d) (2) are not to be applied when no declaration of estimated tax has been filed. Respondent's determination of additions to tax under section 294 (d) (2) for 1952 are accordingly disallowed. For 1953 petitioner did file a declaration of estimated tax, although not until January 14, 1954. Respondent determined that this declaration was untimely and petitioner has offered nothing to indicate the contrary. Nor has petitioner shown that his failure to file a timely declaration was due to reasonable cause and not to willful neglect. The addition to tax determined for 1953 under section 294 (d) (1) (A) is therefore upheld. A declaration having been filed for 1953, Commissioner v. Acker, supra, has no application to the addition to tax determined under section 294 (d) (2) for that year, and this determination is also upheld. Rose S. Harkins, 33 T.C. . . . (Nov. 30, 1959). Section 294 (d) (1) (B) imposes an addition to tax for failure to pay installments of estimated tax when either a timely declaration was filed or a declaration was late due to reasonable cause and not to willful neglect. Respondent may not impose additions to tax under both section 294 (d) (1) (A) and section 294 (d) (1) (B). Regs. 118, sec. 39.294-1 (b) (2). The addition to tax determined for 1953 under section 294 (d) (1) (B) is accordingly disallowed.

Decision will be entered under Rule 50.

DECISION

(Title Omitted)

Respondent having on May 4, 1960 filed a recomputation of tax for entry of decision in accordance with Memorandum Findings of Fact and Opinion herein, filed February 29, 1960, and this proceeding having been called from the Washington, D. C. calendar on June 8, 1960, and petitioners not having appeared in opposition to respondent's computation, now, therefore, it is

Ordered and Decided: That there are deficiencies in income tax and additions to tax as follows:

		Additions to tax—I.R.C. 1939		
Year	Deficiency	Sec. 294 (d) (1) (A)	Sec. 294 (d) (1) (B)	Sec. 294(d) (2)
1952	$ 297.04	$2,664.07		None
1953	15,459.18	1,164.06	None	None

CLARENCE V. OPPER,
Judge.

Enter:
Entered Jun. 13, 1960.
Served Jun. 14, 1960.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18963

A. J. WHIPPLE and MILDRED WHIPPLE,
Petitioners,

versus

COMMISSIONER OF INTERNAL REVENUE
Respondent.

Petition for Review of Decision of the Tax Court of the United States

(April 4, 1962)

Before TUTTLE, Chief Judge, HUTCHESON and RIVES, Circuit Judges.

TUTTLE, Chief Judge: The taxpayer-petitioners here complain of the decision of the Tax Court which held that the taxpayers' advances to the corporation, in which the husband held a majority interest, represented, within the meaning of Section 23 (k) of the 1939 Internal Revenue Code, a non-business rather than a business bad debt, when these advances became worthless upon the insolvency of the corporation. So far as is significant here a non-business

bad debt is defined in the statute as one "other than a debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business." The debt which the petitioner claims he should be allowed to deduct as a business bad debt represents the balance of unpaid advances which Whipple had made to Mission Orange Bottling Company, a soft drink bottling company, in which he owned approximately 80% of the stock and of which, at the time of the debt becoming worthless, he had assumed the active management because of its unsuccessful operation thus far. The final advance of $48,000 was made by taxpayer to Mission Orange coincidentally with its transfer to him of its entire physical assets on December 15, 1953. This left his unrecovered claim against Mission Orange at $56,975.10. It is conceded that this amount became worthless during the month of December, 1953.

The Tax Court, based on ample evidence, found that during the period of four years commencing in 1949, petitioner was instrumental in incorporating fifteen corporations, fourteen of these were engaged in construction, building or real estate business; petitioner owned an interest in five additional construction or real estate corporations, and at one time or another was a member of ten partnerships involved in similar activities; during this period of time the petitioner spent the major part of his time and energies in the construction or real estate business, or the related building supply business; on April 25, 1951, petitioner obtained a franchise from the Mission Dry Corporation entitling him to produce, bottle, distribute and sell Mission Beverages in certain counties in Texas; during the same month he purchased the bottling machinery and equipment then owned by one D. C. Casey, who was operating the Mission Orange

Company in Lubbock, Texas; he conducted this business as a sole proprietorship until approximately July 1, 1951, at which time he organized debtor corporation, Mission Orange Bottling Company, and transferred the bottling machinery and equipment to it; the bottling business was apparently not successful, for during the years 1952 and 1953, he made advances to it so that including the amount which the corporation owed him as the result of his sale of the bottling assets, it was indebted to him in the sum of $79,489.06, on December 1, 1953. On December 15th petitioner advanced Mission Orange $48,000 to pay general creditors, and on the same date he received a transfer from Mission Orange of bottling machinery, equipment and an automobile, which had the value of $70,414.66. This left a net amount due by Mission Orange to him of $56,975.10, which the Tax Court found became worthless during the month of December, 1953.

The Tax Court, in its opinion, stated:

> "If we were required to find a definite time of worthlessness we should be inclined to say December 15, 1953, at which time petitioner received the bottling machinery from Mission Orange in partial satisfaction of that corporation's obligation."

Thus it appears that at the time when the sum of $48,000 of the indebtedness in issue was advanced to Mission Orange petitioner had no hope of its being recovered.

Petitioner recognizes the usual rule that where the controlling stockholder of a corporation is unable to obtain repayment of moneys he advances to his corporation to bolster up its operating possibilities this is generally con-

sidered a non-business bad debt. This follows because in such a case the loan or advance made by the taxpayer to the corporation is no part of any business which he is engaged in individually. It is an advance or loan made by him to enable his wholly owned corporation to make a profit. The petitioner here, however, contends that his extensive activity in the formation of the numerous corporations and the extensive activity he himself performed in attempting to save the Mission Orange Company in its operation, made these particular advances loans in some separate trade or business carried on by the taxpayer.

The Tax Court made the following findings of fact:

> "Petitioner was not in the business of organizing, promoting, managing or financing corporations in 1953. He was not in the business of lending money in that year."

In its opinion the Tax Court also determined that taxpayer was not personally in the business of bottling and selling soft drinks at the time he made the advances that resulted in the debt here in issue.

In the case of *Giblin v. Commissioner*, 5 Cir., 227 F. 2d 692, this Court said:

> "We recognize the fact that the question whether the activities of a taxpayer constitute carrying on a trade or business is largely one of fact, the solution of which 'requires an examination of the facts in each case.' Higgins v. Commissioner of Internal Revenue, 312 U.S. 212, 217, 61 S. Ct. 475, 478, 85 L. Ed. 783. The findings of the Tax Court or the District Court, therefore, are normally critical on this issue."

The Giblin case is one in which this Court found that under the peculiar circumstances which were there present a taxpayer could treat a loss, resulting from the failure of his wholly or partially owned corporations to repay advances, as a business bad debt. In articulating the circumstances which justified a finding of the existence of a business bad debt, we said:

> "Taxpayer did not seek to show that he was engaged in the business of making loans. Neither did he seek to have the Tax Court 'pierce the corporate veil' and find that he was engaged in the restaurant business or in any of the other businesses which he had promoted and dealt with during the preceding twenty years. What he did seek to prove was that he was regularly engaged in the business of seeking out business opportunities, promoting, organizing and financing them, contributing to them substantially 50% of his time and energy and then disposing of them either at a profit or loss . . ."

We further stated:

> "Petitioner's right to deduct the amount of the cancelled debt depends not upon his showing, as the Tax Court seemed to think, that he was in the business of lending money, but rather that he was regularly engaged in the business of 'dealing in enterprises,' during the course of which he operated either as a proprietor, as a stockholder, as a partner or a lender or in a combination of these capacities, contributing to each enterprise his own initiative and energy, and such financial backing as it required."

We think that the Tax Court was amply warranted in finding that there was no evidence in this record, other than the simple fact that taxpayer had used his talents as a building contractor to organize a large number of companies to conduct such building operations, that he was interested in any way in doing any more than enabling these separate corporation to achieve a successful and lucrative operation as corporations. Taxpayer's claim, it seems clear to us, falls within the class of those who fail to recognize the distinction between carrying on one's business through a corporate form, which of course, requires some organizing and financing, and the business of dealing in corporations, which may likewise require some financing arrangements. As stated by the Court of Appeals for the Ninth Circuit in *Holz v. Commissioner of Internal Revenue,* 256 F. 2d 865, at page 870:

> "Where the former is the situation, it is horn book law, and not contested by petitioner, that the corporate entity is the primary debtor and stockholder loans to protect his investment or increase its value do not create a separate business for the stockholders. As the Fifth Circuit recently said in distinguishing the Giblin case, supra, 'Petitioner was not engaged in the business of dealing in enterprises.' Pokress v. C.I.R., 1956, 234 F. 2d 146, 150 note 12 Nor did the Tax Court, nor do we, find him so engaged here. The finding of the Tax Court is binding upon us unless clearly erroneous. Here, it is not."

This opinion then cited the case of *Burnet v. Clark,* 287 U.S. 410, where at page 415 the Supreme Court said:

> "[The taxpayer] was not regularly engaged in indorsing notes, or buying and selling corporate securities. The unfortunate indorsements were not part of his ordinary business, but occasional transactions intended to preserve the value of his investment in capital shares."

The case of *Ferguson v. Commission*, 4 Cir., 253 F. 2d 403, is equally persuasive of the correctness of the Tax Court's decision here. In that case it was said, "It is now well settled that debts such as these are not deductible as business bad debts unless the taxpayer is so extensively engaged in the business of promoting or financing business ventures as to elevate that activity to the status of a separate business." 253 F. 2d 403, 406.

So far as relates to the petitioner's contention that he was engaged in the separate business of lending money, we think that the Tax Court's finding that the relatively small number of interest bearing loans made by the taxpayer did not constitute a separate business engaged in by him. Further more, we think it was certainly within the ability of the Tax Court to find as a fact that the particular advances made to the Mission Orange Company, especially the $48,000 advanced on the date on which it stripped itself of all of its physical assets, were not made in the course of a separate business conducted by the taxpayer. We certainly cannot find that this determination by the Tax Court was clearly erroneous.

The decision of the Tax Court is

AFFIRMED.

HUTCHESON, Circuit Judge, Dissenting:

The sole question for decision in this case is whether the $56,975.10 debt of Mission Orange Bottling Company of Lubbock, Inc. to petitioner, A. J. Whipple, was a business bad debt or a non-business bad debt within the meaning of Sec. 23 (k) (1) or Section 23 (k) (4), respectively, Internal Revenue Code of 1939. I am unable to agree with the opinion of the majority, and, for the reasons hereinafter stated, I dissent.

It was stipulated: (1) that it was a debt; and (2) that it became worthless in 1953.

The answer to the question turns on whether or not the loss resulting from the debt's becoming worthless did or did not bear a proximate relationship to the conduct of a business in which petitioner Whipple was engaged at the time the debt became worthless.

The taxpayer is here insisting that the tax court below and the government in its brief and on oral argument have failed to recognize and give effect to the fact that, though taxpayer's activities which gave the debt rise might not lend themselves to a specific name or label, they were certainly of a business nature within the meaning and intent of the act, in that the petitioner engaged in them for the purpose of deriving income therefrom, and the bad debt loss suffered had a direct relationship to the conduct of these business activities.

I agree with these views. While the act is loosely drawn and has the fault of a negative approach to definition, that is, seems to be more concerned with stating what is not, than with what is, a business debt, we think that

the language of the statute and regulation involved and its legislative history shows that the intent was not to

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[1] **Internal Revenue Code of 1939:**

"Sec. 23. Deductions from Gross Income.

"In computing net income there shall be allowed as deductions:

* * * * *

[As amended by Sec. 1315 (a) Rev. Act of 1942, c. 619, 56 Stat. 798] (k) Bad Debts.—

"(1) General rule.—Debts which become worthless within the taxable year; * * *. This paragraph shall not apply in the case of a taxpayer, other than a corporation, with respect to a non-business debt, as defined in paragraph (4) of this subsection. * * *"

* * * * *

"(4) Non-business debts.—In the case of a taxpayer, other than a corporation, if a non-business debt becomes worthless within the taxable year, the loss resulting therefrom shall be considered a loss from the sale or exchange, during the taxable year, of a capital asset held for not more than 6 months. The term "non-business debt" means a debt other than a debt evidenced by a security as defined in paragraph (3) and other than a debt, the worthlessness of which is incurred in the taxpayer's trade or business."

* * * *

(26 U. S. C. 1952 ed. Sec. 23)

"Treasury Regulations 118 (1939 Code):

"Sec. 39.23 (k)—6. Non-business bad debts. (a) * * *

"(b) The character of the debt for this purpose is not controlled by the circumstances attending its creation or its subsequent acquisition by the taxpayer or by the use to which the borrowed funds are put by the recipient, but is to be determined rather by the relation which the loss resulting from the debt's becoming worthless bears to the trade or business of the taxpayer. If that relation is a proximate one in the conduct of the trade or business in which the taxpayer is engaged at the time the debt becomes worthless, the debt is not a non-business debt for the purposes of this section."

[2] As the House of Representatives Report No. 2333, 77th Congress, First Session, states in regard to the Revenue Act of 1942, at page 409 of Cumulative Bulletin 1942-2:

"The present law gives the same tax treatment to bad debts incurred in non-business transactions as it allows to business bad debts. An example of **a non-busicss bad debt would be an**

deny a business bad debt deduction under the facts presented in this case.

I think, too, that the tax court, the Commissioner, and the majority opinion of this court have erred when, instead of relying on the language and legislative history of the act, they have placed their reliance on the gloss which has been put on the statute by various and sundry decisions cited by them which have construed this remedial statute so narrowly as practically to defeat its remedial purpose.

The language of the act and its legislative history both show that congress, desiring to encourage risk taking with respect to loans incurred in connection with business and to discourage the making of loans for use taxwise to kinsmen or friends, gave favorable tax treatment to bad debts arising out of, or in connection with business ventures, while denying such treatment to purely personal bad debts or those where other than business considerations moti-

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unrepaid loan to a friend or relative, while business bad debts arise in the course of the taxpayer's trade or business. This liberal allowance for non-business bad debts has suffered considerable abuse through taxpayers making loans which they do not expect to be repaid. This practice is particularly prevalent in the case of loans to persons with respect to whom the taxpayer is not entitled to a credit for dependents. The situation has presented serious administrative difficulties because of the requirement of proof." (emphasis added).

The Senate Committee Reports contain no further explanation of the purpose for the insertion of the subsection which became 23 (k) (4).

The relationship which the loan must have to a taxpayer's business was explained in the House Committee Report on page 31 of C.B. 1942-2 where it quoted from Treasury Regulation 118, as shown in note 1, above, and then went on to give illustrations of debts which were incurred in what was obviously a business transaction to show how the time of the debt's becoming worthless would control in determining its proximate relationship to the taxpayer's business.

vated the lending. I think that the purpose of the statute was, and is, not advanced and the remedy is completely defeated when the mischief the statute was designated to meet is dropped entirely out of consideration, as in the board's decision here, in some of the decisions the board relies on, and in the majority opinion.

In the beginning of the interpretation of the statute and its application, the decisions were not so at fault. In the very first year of the applicability of Sec. 23 (k) (4), 1943, the question of how proximate the relationship of the debt to a business of the taxpayer must be was raised and decided in the case of Robert Cluett, 3rd, et ux v. Commissioner, 8 T. C. 1178 (1947). In that case the taxpayer sold a one-fourth ownership in a stock exchange seat for $125,000 and took a note from the purchaser for $65,000. The purchaser subsequently went bankrupt, leaving $28,985.97 owing on the note. The taxpayer deducted this sum as a business bad debt and the court allowed it as such.[3]

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[3]In allowing this as a business bad debt, the court said:

"The principal contention of the respondent seems to be that the loss from the bad debt in question did not arise in the ordinary course of the operation of a business involving the buying and selling of stock exchange seats. The petitioner does not contend that he was regularly engaged in any such business. Neither does he contend that the loss in question was one sustained in a usual transaction of any partnership of which he was a member. He contends, however, that the loss resulted directly from the operation of the business in which he was regularly engaged, both at the time the sale was made and at the time the debt became worthless, and, in the alternative, that the loss was at least proximately related to or connected with the business. * * *"

"The legislative history of Sec. 23 (k) (4) indicated that its principal purpose was to place a limitation upon losses from bad debts, such as loans to relatives or friends which had no connection with the business of the lender. * * * (Emphasis supplied)

(Cont'd.)

It is significant to note that the Treasury Department acquiesced in this interpretation of the statute, 1947-2 CB (2).

The next case to pass on the meaning of Sec. 23 (k) (4) was that of *Campbell v. Commissioner*, 11 T. C. 510 (1948), involving the taxable year 1944. The three petitioners in the Campbell case had been engaged since 1929 in organizing, owning and operating corporations (in total 12) engaged in the retail coal business. It was their practice as a part of their business to advance to (or leave with) those corporations on open account money belonging to them in many different instances. One of those corporations was the Campbell Bros. Coal Co. of Akron. The loans to that company which were in question were similar to loans made to others of their companies. The court, in determining that the loss resulting from such worthlessness was a business bad debt, denied the government's claim that taxpayer's loss fell under Section 23 (k) (4).[4]

"The debt here in question was not the result of a loan by the petitioner to a friend or relative or an isolated transaction which bore no relation whatsoever to the business in which he was engaged, but, on the contrary, was closely related to the business of owning and using a stock exchange membership for the production of income, in which business the petitioner was engaged not only in 1929, when the debt was created, but also in 1943, when it became worthless. * * *"

[4]The court said: "* * * They were debts, the loss from the worthlessness of which was incurred in the taxpayer's business. A finding has been made that they were business rather than nonbusiness bad debts, because the evidence shows that they had a direct connection with the business carried on by these petitioners, and the losses were directly the result of, and incurred in, the business of **organizing and operating corporations engaged in the retail coal business, which business of**

The commissioner also acquiesced in this case, decided in 1948, 1949-1 CB (1).

The Treasury's acquiescence in the Cluett and Campbell cases has never been withdrawn, and they still stand as the basic interpretative decisions on the statute.

The taxpayer in the Cluett case was certainly not in the business of selling stock exchange seats, and Mr. Campbell was not in the business of selling coal companies. Yet the government contends, and the tax court and the majority have erroneously held, that in order for the loss to be deductible, taxpayer Whipple must show that the numerous corporate enterprises which he promoted, financed, and managed were formed by him for sale. This extension of the restriction on the qualification of business bad debts contended for by commissioner and tax court considerably restricts the remedy which congress provided for curing the mischief it had in mind. I think it clear that such restriction was never contemplated by Congress. Indeed the contention pressed here emasculates a clearly intended remedial law.

Looking at the question in the light of the language of the act and its legislative history, I am in no doubt that the tax court was wrong in citing and relying on cases to the contrary of these views for such a restrictive and defeating construction.

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organizing and operating such corporations was carried on by the petitioners during the taxable year. These are not cases in which losses of corporations are being confused with losses of individuals or in which the business of a corporation is being confused with the business of individuals. Nor are they like net loss carry-over cases in which the loss occurred in isolated transactions rather than in the operation of a business. * * *" (Emphasis added)

I am also of the opinion that the great weight and number of decided cases[5] and the strength of their reasoning support petitioner's view. The case of *Giblin v. Commissioner*, note 5, supra, decided by this court, carefully and correctly construed and applied the statute and gave it a construction and application which the petitioner contends for and is entitled to here.

It seems to me that the basic fault of the majority opinion is in holding, as it in effect does, that business bad debt treatment must be denied the taxpayer here because the loan was to a corporation in which he was interested. This holding is, in my opinion, a clear addition to the taxing statute. If congress had so intended, it could and would have so provided. Not having done so, neither the tax court nor this court can construe the statute as though it contained such provision.

EDWARD W. WADSWORTH
Edward W. Wadsworth
Clerk, U. S. Court of Appeals,
Fifth Circuit
New Orleans, Louisiana

May 28, 1962

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[5]Giblin v. Commissioner, 227 F (2) 692; Maytag v. U. S., 289 F (2) 647; Trent v. Commissioner, 291 F (2) 669; Maloney v. Spencer, 172 F (2) 638; Sage v. Commissioner, 15 T.C. 299; Foss v. Commissioner, 75 F (2) 226; Commissioner v. Stokes Estate, 200 F (2) 637; Scott v. Commissioner, 14 TCM 1029.

JUDGMENT.

Extract from the Minutes of April 4, 1962.

A. J. WHIPPLE and MILDRED WHIPPLE

No. 18963 versus

COMMISSIONER OF INTERNAL REVENUE

This cause came on to be heard on the petition of A. J. Whipple and Mildred Whipple for review of a decision of the Tax Court of the United States, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decision of the Tax Court in this cause be, and the same is hereby, affirmed.

"Hutcheson, Circuit Judge, Dissenting."

* * *

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18, 963

A. J. WHIPPLE and MILDRED WHIPPLE,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE
Respondent.

Petition for Review of Decision of the Tax Court of the United States.

(May 11, 1962)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, HUTCHESON and RIVES, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

HUTCHESON, Circuit Judge: "I dissent"

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18, 963

A. J. WHIPPLE and MILDRED WHIPPLE,
Petitioners,

versus

COMMISSIONER OF INTERNAL REVENUE
Respondent.

ON CONSIDERATION OF THE APPLICATION of the petitioners in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable petitioners to apply for and to obtain a writ of certiorari from the Supeme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of 90 days from May 11, 1962; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within 90 days from May 11, 1962 there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of 90 days from May 11, 1962, unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ ELBERT P. TUTTLE
Chief Judge